SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 788

JAMES D. McCOLLOUGH,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY and
LEVINGSTON SHIPBUILDING COMPANY,

Respondents.

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

American Trial Lawyers Association
Admiralty Section
By: Paul S. Edelman

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On Petition and Brief.

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Statement of Interest of the *Amicus Curiae*

Paul S. Edelman, of Kreindler & Kreindler, New York, New York, a member of the bar in this Court, on behalf of the American Trial Lawyers Association, respectfully petitions this Court for leave to file a brief *Amicus Curiae* on behalf of petitioner herein, and if granted, for this Honorable Court to consider the arguments and cases in point following this Statement of Interest.

Consent to the filing of this brief has been given by the attorneys for the Respondents and also by Hon. Erwin N. Griswold, Solicitor General, on behalf of the United States Department of Justice, representing R. J. Shea, Deputy Commissioner.

The American Trial Lawyers Association, is a national bar association, consisting of more than 20,000 lawyers, primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys represent members of the merchant marine and other maritime workers who are engaged in a hazardous industry and are recognized as having a special status both by legislation and generally in the courts of the land. All of these maritime workers have a real and direct interest in the outcome of this appeal.

Said association is vitally concerned in the final outcome of this case involving as it does a situation which may finally resolve the tortuous series of cases which have attempted for over a generation to make a clear line by which attorneys and injured maritime workers will know their rights. It is a question of serious importance since 25% of all maritime workers' injuries occur on docks and piers, and in most states the average compensation is but half the federal rate.

A resolution of the issues in this case will materially affect not only the financial plight of injured maritime workers, but is of paramount importance to hundreds of thousands of workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief *Amicus Curiae*.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

On behalf of James D. McCollough, the American Trial Lawyers Association prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered August 9, 1967.

Questions Presented

The employee was injured while on a working barge permanently anchored on a navigable river, the barge rising and falling with the flow of the river. The barge was one of several adjacent to a floating drydock. The deputy commissioner awarded compensation to the employee, petitioner herein. Was the award within the coverage of the Longshoremen's Act as "occurring upon the navigable waters of the United States" particularly within the presumption of coverage granted by the Longshoremen's Act?

Statement

The employee suffered injury while in maritime employment on a floating steel barge, one of four which constituted an outfitting pier. The barges were fixed in place, but rose and fell with the movement of the Sabine River, a major and navigable waterway.

An award was made by the deputy commissioner and affirmed in the district court. On appeal to the Court of Appeals for the Fifth Circuit, the award was reversed on the basis that the structure on which the employee was injured was essentially an extension of land although the opinion conceded the situs to be a "floating barge" (p. 11).

Besides the particular fact situation of this case which involved a floating barge, your petitioner seeks to have this Court settle a more important and general question of maritime law, namely whether the Longshoremen's Act is co-extensive with federal maritime jurisdiction and whether work barges and other maritime structures concededly above or on navigable waters are within the coverage of the Longshoremen's Act. Will man-made structures above or on such waters withdraw these waters from the federal interest?

Nearly one-quarter of all injuries of maritime workers occur on man-made structures on or over maritime waters adjacent to ships being either loaded, unloaded or as in this case, repaired. Awards available under the federal act are typically twice the awards available under state acts, as in this case, and the decision below is narrow not only in its holding of coverage for the Longshoremen's Act, but is narrow in its philosophy of federal interest in a just compensation remedy.

In addition, this Court is being asked to answer the question whether the Longshoremen's Act jurisdiction is co-extensive with maritime contracts which concern maritime workers directly involved in ship repair work at a floating dry dock.

POINT I

The employee was injured on a floating work barge which rose and fell and was thus "upon the navigable waters of the United States" under Section 903(a) of the Longshoremen's Act.

The Circuit Court below held that the work barge on which Mr. McCollough was injured was an extension of land, and denied recovery. But this contention is answered by the observations that the waters below every barge or vessel would then logically be withdrawn from navigation. The absurd result would be that every maritime worker on any anchored barge would be denied the application of the Act even though as in the case at bar the waters were tidal and went up and down with the barge.

Claimant was injured on a barge in the water adjacent to and necessary to the working of a floating drydock. Both outfitting barge and drydock rose and fell with the water, and access to the drydock was over the outfitting barge. In the very activity in which claimant suffered his injury, access to the vessel being sandblasted required the

working together of equipment over the outfitting barge to the drydock area.

Maritime workers injured on a "drydock" are specifically covered by the Longshoremen's Act as well as those who work at least in part upon navigable waters.

33 U.S.C., Sec. 902(4); 903(a).

A "drydock" included a marine railway whereby a vessel is drawn from the water onto land.

Avondale Marine Ways, Inc. v. *Henderson* (1953), 346 U. S. 366.

To make this meaningful, the land adjacent to a marine railway is within the geographical and functional scope of the Longshoremen's Act. This has been the consistent view of the Courts of Appeals.

Holland v. *Harrison Bros. Drydock etc.* (5th Cir. 1962), 306 F. 2d 369, 372, and *Maryland Casualty Co.* v. *Lawson* (5th Cir. 1939), 101 F. 2d 732, 733, cited with approval in the *Avondale Marine Ways* case.

A "building way" injury has also been held covered by the Longshoremen's Act. A building way is on land and used for new ship construction, but the outermost end extends into the water for the launching of a completed vessel. The "building way" was held to be sufficiently within the term "dry dock" to allow recovery for a workman under the Longshoremen's Act in *Port Houston Ironworks Inc.* v. *Calbeck* (S. D. Tex., 1964), 227 F. Supp. 966.

The District Court below rightfully made this point in its decision for the claimant.

The record indicates that claimant was upon a work barge next to a floating dry dock and was involved in an operation for the sandblasting of an oil barge tied up on the "other side of Dry Dock No. 1". Claimant was feed-

ing the sandblasting machine on the work barge, at the time of this injury. The work barge was functionally involved with the oil barge repair work at the dry dock and the work barge was connected to the dry dock. At the time of the accident, work at the dry dock area required that there be direct access across the floating outfitting barge.

Compensation acts in general, and the Longshoremen's Act in particular are to be liberally construed in favor of coverage.

Many decisions involving the Longshoremen's Act discuss this principle of statutory construction. *Reed* v. *The Yaka* (1963), 373 U. S. 410, restates this proposition:

> "'We have previously said that the Longshoremen's Act must be liberally construed in the conformance with its purpose, and in a way which avoids harsh and incongruous results."

Accord:

Voris v. *Eikel* (1953), 346 U. S. 328.

In addition, we have the long and still vital history of the "Twilight Zone" cases before us. Ever since 1942 in *Davis* v. *Department of Labor and Industries,* 317 U. S. 249, the Supreme Court has held that wherever there is doubt in applying state as opposed to federal compensation acts in maritime situations, the *tribunal chosen by the claimant* has a presumption of valid jurisdiction. *Davis* states:

> ". . . the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side."

Davis has been interpreted as ". . . a revolutionary decision deemed necessary to escape an intolerable situation

and as designated to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way . . ."

Moores' case Supp. Mass. (1948), 323 Mass. 162, 167, 80 N. E. 2d 478, 480 (aff'd (1948) 335 U. S. 874, *sub nom-Bethlehem Steel Co.* v. *Moores.*

The *Calbeck* case (1962), 370 U. S. 114, still makes clear that in any doubtful area the claimant may elect his remedy, and that the Twilight Zone rule still holds.

Respondents would undo all the practical solutions brought forward by the *Davis* case, and applied since 1942.

POINT II

The employee was injured adjacent to a drydock and vessel while serving the vessel and was injured within the scope of admiralty jurisdiction and thus within the reach of the Longshoremen's Act.

The Supreme Court has made it clear on various occasions when the issue was before it, that in passing the Longshoremen's Act, "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter", and that, ". . . Congress intended the compensation act to have a coverage co-extensive with the limits of its authority".

This holding is clearly stated in *Calbeck* v. *Travelers Ins. Co.*, 370 U. S. 114 (1962), which dealt with the application of the federal act to a welder engaged in "new" ship construction, as opposed to the suggested exclusive remedy of state compensation. The Court cited extensively the language quoted from *DeBardeleben Coal Corp.* v. *Henderson* (5th Cir. 1944), 142 F. 2d 481, at page 130 of 370 U. S.

Once accepting this clear proposition, it is only necessary to establish how far "ashore" the admiralty jurisdiction extends.

By statute, the Admiralty Extension Act, 46 U.S.C., Sec. 740 (1948), provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."

The meaning of "caused by a vessel on navigable waters" has authoritatively been held to mean that even a dockside injury is covered by maritime law where the injury arose out of some "service to the ship".

The Supreme Court so held in *Gutierrez* v. *Waterman Steamship Co.*, 373 U. S. 206 (1963), and rejected the contention that the injury must be caused by the vessel or ship's appurtenances. In *Gutierrez*, a longshoreman was injured on a wharf when he slipped on beans that had spilled out of bags being unloaded from the vessel, and the Court held that this dockside accident was within the maritime jurisdiction and subject to the doctrine of unseaworthiness.

Justice White, speaking for the Court made it clear that the impact on dockside was within the ambit of maritime jurisdiction because of the Extension of Admiralty Jurisdiction Act, and stated:

> "Respondent contends that it is not liable at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C., Sec. 740, swept it away. * * *"

From *DeBardeleben* to *Gutierrez*, it is demonstrated that the Longshoremen's Act is co-extensive with admiralty jurisdiction, and that admiralty jurisdiction extends even to dockside where a worker is injured because of an activity related to a vessel although not caused by direct contact with a vessel or its appurtenances.

The wide application of the rule that the Longshoremen's Act is co-extensive with federal maritime jurisdiction is underlined by *Boston Metals Co.* v. *O'Hearne*, D. C. Md. Adm. #4412, unreported opinion, June 20, 1963, aff'd (4th Cir. 1964) 329 F. 2d 504. In that case a widow of a welder who was killed on a decommissioned hulk was held entitled to collect under the Act. The hulk was fast aground and in the process of being scrapped. District Judge Winter in the unreported opinion to this case stated:

> "I think the *Calbeck* case equates, I think the legislative history (of the Longshoremen's Act) supports, and I think the decisions in this Circuit also support the concept that *navigable waters* of the United States *means the admiralty jurisdiction of the United States, whenever it may be from time to time.*
>
> * * * I think that the *Calbeck* case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' *Act* was *not* to be *frozen* to the *admiralty jurisdiction* of the United States as it then existed *in 1927* or as it was *considered then* to *exist*, but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under *subsequent legislation or*, as a result of *subsequent court decisions*, the admiralty jurisdiction of the United States is being expanded and the application of the *Longshoremen's* and Harbor Workers' *Act expands along with it.*"

In *Holland* v. *Harrison Bros. Drydock, etc.* (5th Cir. 1962), 306 F. 2d 369, 373, footnote 4 states that not only the locality is important but also "the nature of the work".

The footnote further states:

> "* * * The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the history of the Act indicates that its *underlying purpose* was to *embrace the admiralty jurisdiction whatever that might be.*" (Emphasis added.)

The reasoning above has allowed recovery for seamen ashore when injured in the service of the ship under the Jones Act.

In *O'Connell* v. *Great Lakes Dredge and Dock Co.* (1943), 318 U. S. 36, a seaman was injured on land during the repair on a gasket connection to a land pipe used in discharging a ship's cargo.

A handyman who assisted in navigation of a dredge was injured in a shed on shore due to an explosion in a coal stove while he was placing lamps from the dredge in the shed. Recovery was sanctioned under the Jones Act in *Senko* v. *LaCrosse Dredging Corp.* (1927), 352 U. S. 370.

The most far-reaching case is, of course, *Hopson* v. *Texaco, Inc.* (1966), 15 L. Ed. 2d 740. In that case two ill seamen in a foreign port were being taken to the United States consul in a taxi cab procured by the ship's master. The cab driver was in a collision, through his negligence. One seaman was killed and one was injured. The taxi service was held to be an "agent" of the shipowner, and recoveries were allowed against the shipowner under the Jones Act.

The same grant of power to Congress by the Constitution delimits the reach of the Jones Act and the Longshoremen's Act. Where an injury occurs because of a vessel-connected activity the scope of both these federal statutes extends and grants a remedy.

The fact that the barge in question is denoted a "pier" or "wharf" by respondents should not affect the result.

"A wharf is a structure on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. Hence waters of sufficient depth to float vessels is an essential part of every wharf. *A wharf cannot be defined or conceived except in connection with adjacent navigable waters.*" (Emphasis supplied.)

Langdon v. *City of New York* (1883), 93 N. Y. 129, 151.

POINT III

The Longshoremen's Act applies to maritime contracts of employment on man-made structures on or above navigable waters.

Admirably jurisdiction extends to all damage or injury occurring during the performance of a maritime contract, including contracts of ship repair and whether the injury involves piers and wharves over navigable waters, or involving man-made structures such as a work barge upon navigable waters.

As indicated in Point II, it is the contractual maritime jurisdiction which allows Jones Act recovery for crew members injured ashore through the negligence of their employer or agents of the employer.

The Longshoremen's Act is based on the New York Workmen's Compensation Act. Because the New York Act regulates the employment contract, it even applied to employees injured in other states so long as New York has an interest in the employment contract.

Baduski v. *S. Gumpert Co., Inc.*, 277 App. Div. 591, 102 N.Y.S. 2d 297, App. dism. 302 N. Y. 702.

Cases in Point I demonstrate the applicability of land-based injuries in conjunction with repair work on dry-docks. These cases make the situation in the case at bar

applicable since even if the floating barge was an appurtenance to land, the injury occurred while a ship was at a drydock.

But the dry dock cases also demonstrate that injuries on a pier or wharf are within the ambit of the Longshoremen's Act, because a pier or wharf is on or over navigable water.

A federal interest in navigable waters is not withdrawn by placing man-made structures on or over such waters.

United States v. *Appalachian Power Co.* (1940), 311 U. S. 377, 408, 409.

Economy L. & P. Co. v. *United States* (1921), 256 U. S. 113, 118, 124.

Impact on a dock or pier has been the basis for recovery under the federal Longshoremen's Act where the employee was thereafter propelled into the water.

Interlake S.S. Co. v. *Nielsen* (6th Cir. 1964), 338 F. 2d 879, cert. den. 381 U. S. 934.

Michigan Mutual Liability Co. v. *Arrien* (2d Cir. 1965), 344 F. 2d 640, cert. den. 382 U. S. 835 (injury on a "stage" of skids extending over the water).

The mere fact that the injured party subsequently went into the water should not be decisive of coverage of the Act where the initial injury was on the dock or pier; if the injury was in maritime employment when it occurred on the pier in these cases it should also be applicable to the case at bar.

If on the other hand an artificial distinction is made between what is "on" and what is "over" navigable water then airplane accidents would be excluded from coverage by the Death On The High Seas Act. But in all logic, such deaths including explosions in airplanes in flight and the like are covered by the Death On the High Seas Act.

D'Aleman v. *Pan American World Airways* (2d Cir. 1958), 259 F. 2d 493.

This Court has never definitively decided that an injury on a man-made structure adjacent to ship repair activity is precluded from recovery under the federal Act. It is respectfully submitted that the legislative history of the Act sought this application; it is consistent with the jurisdiction of the Congress over such activities, and the Act presumes coverage of the Act in a borderline activity (Sec. 920).

The legislative history of the Act in 1926 and 1927 indicated that maritime coverage was the purpose of the Act, and that the Act was to be applied as far ashore as the maritime activity itself extended. If navigable waters are involved in a broad, common-sense definition, the employee has an election to come under the federal Act.

Calbeck v. *Travelers Inc. Co.* (1962), 370 U. S. 114. *Holland* v. *Harrison Bros. Dry Dock, etc.* (5th Cir. 1962), 306 F. 2d 369, 372, 373.

From the very beginning of the controversy over federal and state jurisdiction in *Southern Pacific Co.* v. *Jensen* (1917), 244 U. S. 205, 217, it was made clear that a maritime worker whose "employment was a maritime contract" and who received maritime-connected injuries was within the federal concern. See also *Atlantic Transport Co.* v. *Imbrovek* (1914), 234 U. S. 52, 62.

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION,

By Paul S. Edelman,
Attorney for *Amicus Curiae.*

Dated at New York, New York, this 27th day of November, 1967.

Certificate.

This is to certify that on the 27th day of November, 1967, copies of the above application to appear as *Amicus Curiae* and brief in support thereof have been forwarded to Hon. Erwin N. Griswold, Solicitor General, United States Department of Justice, Washington, D. C. 20530, Attorneys for R. J. Shea, Deputy Commissioner, to the Honorable Louis V. Nelson, Attorney for Respondents, The Travelers Insurance Company and Levingston Shipbuilding Company, P. O. Box 1632, Beaumont, Texas; and to the Honorable Ward Stephenson of Stephenson, Thompson and Morris, at the Stephenson Building, Orange, Texas, Attorney for Petitioner, James D. McCollough.

.....

PAUL S. EDELMAN